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In the Supreme Court of the United States

October Term, 1936

COMMONWEALTH OF PENNSYLVANIA, EX REL.,
ELMER SULLIVAN, Petitioner

v.

STANLEY ASHE, Warden
State Penitentiary, Western District of Pennsylvania

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of Pennsylvania (R. 33-37) is reported in 188 Atlantic Reporter 841.

JURISDICTION

The opinion of the Supreme Court of Pennsylvania was filed January 11, 1937. The petition for writ of certiorari was filed April 9, 1937. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Is Section 3 of the Act of Assembly of Pennsylvania of March 31, 1860, P. L. 382, which provides, inter alia, that a prisoner serving a sentence in the penitentiary or jail, who breaks such penitentiary or jail, is guilty of a misdemeanor, and upon conviction shall be sentenced to undergo an imprisonment to commence from the expiration of, and for a period of time not exceeding the original sentence by virtue of which he had been imprisoned, unconstitutional by reason of offending the equal protection clause of the fourteenth amendment?

STATUTE AND OTHER AUTHORITY INVOLVED

The applicable provisions of the statutes and other authorities involved, will be found in the appendixes. (A and B, infra, PP.)

STATEMENT

This case arose through a petition filed in the Supreme Court of Pennsylvania by the petitioner for a writ of habeas corpus. The Supreme Court, exercising its original jurisdiction, granted a rule to show cause why such writ should not be granted.

From the petition for habeas corpus (R. 1-14), it appears that the petitioner had originally been sentenced, on April 26, 1929, to serve a term of 3 to 6 years in the Western State Penitentiary. It further appears that on December 28, 1931, petitioner escaped from said prison and was subsequently recaptured. Pursuant to indictment found, the petitioner on December 31, 1931 was sentenced for said breaking of prison to a term of not less than 3 years, nor more than 6 years, to be computed from the expiration of the original sentence.

The petition alleged that the petitioner was illegally confined and unlawfully restrained of his liberty. The Supreme Court of Pennsylvania, in discharging the rule, held that the only question before it was whether or not Section 3 of the Act of March 31, 1860, P. L. 382, was unconstitutional as depriving the petitioner of the equal protection of the laws guaranteed by the fourteenth amendment of the Constitution of the United States, and decided (R. 33-37) that the said section did not contravene the amendment. The Pennsylvania act in question provides, in effect, that any prisoner imprisoned in any penitentiary or jail who breaks such penitentiary or jail shall be guilty of a misdemeanor, and upon conviction of said offense, shall be sentenced to undergo an imprisonment to commence from the expiration of his original sentence for a period of time not exceeding the original sentence by virtue of which he was imprisoned when he so broke prison.

ARGUMENT

The Supreme Court of Pennsylvania in its opinion (R. 33-37) succinctly states the question involved to be "* * * whether a statute adopts an unreasonable classification when, in providing for the sentencing of persons who commit identical crimes, it authorizes the imposition of a severer sentence upon one who had previously offended more grievously than another."

The mere fact that a judge sentences differently one criminal committing the same kind of crime—or even the same crime—from others, has never been regarded as a violation of the equal protection clause of the fourteenth amendment.

This has been settled by the United States Supreme Court in the case of HOWARD ET AL *v.* STATE OF NORTH CAROLINA, 191 U. S. 126 (1903), 48 L. ed. 121. In that case three persons were convicted of the crime of conspiracy to defraud. Upon conviction, two were given ten years' sentence of imprisonment and the third only seven years. The court in holding that this was no denial of the equal protection clause, said on page 136:

> * * * Doubtless there were sufficient reasons for giving to one of the conspirators a less term than the others. At any rate, there is no such inequality as will justify us in setting aside the judgment against the two.

Criminals classify themselves not merely by the kind of crime they commit, but the manner in which they commit it. Cases applying this familiar doctrine of classification are those upholding the habitual criminal statutes, such as GRAHAM *v.* WEST VIRGINIA, 224 U. S. 616 (1921), 56 L. ed. 917, where Chief Justice Hughes said, at page 630:

> * * * The statute in question applied to all those "convicted of an offense, and sentenced to confinement therefor in the penitentiary," who previously have been sentenced to a like punishment. **The fact of such sentence, indicating the gravity of the offense, affords a reasonable basis for classification.** * * * (Boldface ours.)

Again on page 630 the court stated:

> The 14th Amendment is not to be construed "as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment." * * *

See also the case of MOORE *v.* STATE OF MISSOURI, 159 U. S. 673 (1895), 40 L. ed. 301, involving the constitutionality of the Missouri habitual criminal statute where the court said at page 677:

> The reason for holding that the accused is not again punished for the first offense is given in Ross Case by Chief Justice Parker, that "the punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself;" * * *

Classifying the punishment of offenses by previous punishment is not in and of itself arbitrary. It takes no great stretch of the imagination to realize that a person serving a long period of imprisonment who escapes is potentially more dangerous a person at large than one who is serving a shorter period of sentence connoting a lesser crime or less aggravating circumstances. The very crime of escape committed by the person serving a long term is more serious in its effect upon law abiding citizens in the fear that it imposes upon them. It is common knowledge that such per-

sons have more to lose by their recapture and hence are more apt to disregard life and property than others.

Further, the opinion of the Supreme Court of Pennsylvania (R. 33-37) in dismissing the petition for the writ conclusively sets out the controlling authorities for determining the constitutionality of the statute in question.

For the purposes of brevity, respondent relies upon the opinion of the Supreme Court of Pennsylvania and the authorities therein cited, and does not attempt to reiterate such authorities.

CONSIDERATION OF CASES CITED IN THE PETITIONER'S BRIEF

The petitioner's brief cites three cases on escape statutes in other states. In two of them, the escape statute committed no discretion to the judge, but compelled him to impose a sentence equal to that which the prisoner was serving at the time of his escape. Thus, in RE MALLON, 16 Idaho 737 (1909), the escape statute provided:

> * * * 'Every state prisoner confined in the state prison for a term less than for life, who escapes therefrom, is punishable by imprisonment in the state prison for a term equal in length to the term he was serving at the time of such escape; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison.'

The court construed this statute to require the imposition of a sentence equal to that which the prisoner was serving. There was no discretion in the sentencing court. The distinction between that law and the Pennsylvania law is too obvious for extended comment.

In STATE *v.* LEWIN, 53 Kansas 679 (1894), the escape statute provided that, the time that the said convict had served in the said penitentiary prior to the escape:

> * * * shall not be counted as any part of the term of his sentence, but the said convict shall be sentenced by the court to confinement in the state penitentiary for the full term for which he or she was sentenced by the court * * *

Here again there was no discretion vested in the court sentencing the escaped prisoner. The court was bound to resentence a prisoner to the same term of his original offense regardless whether he had served one day or nearly all of it at the time of his escape.

Again the distinction between that law and the one of this State needs no comment.

The third case is the case of STATE *v.* JOHNSEY, 46 Okla. Criminal Reports 233 (1930), in which case was involved a statute punishing escape by imprisonment in said prison for a term not exceeding double the term for which the prisoner was sentenced when he escaped. The escape law construed in that case did allow the same discretion to be found in our Pennsylvania statute. The court there, however, merely following the case RE MALLON and KANSAS *v.* LEWIN, supra, declared the act unconstitutional, and despite the obvious distinction between the respective statutes, gave no consideration to the discretion left to the trial court.

Reference is made to petitioner's cases solely because petitioner in citing said cases as authority assumes that the statutes in the three states were identical to the Pennsylvania act.

CONCLUSION

Respondent respectfully points out that the only matter which was properly before the Supreme Court of Pennsylvania was the question of the constitutionality of Section 3 of the Act of March 31, 1860, P. L. 382. There was no question raised in the petition for habeas corpus concerning the unconstitutional application of an otherwise constitutional statute. Therefore, such question is not properly before this Court.

The opinion of the Supreme Court of Pennsylvania is correct and is in accord with the decisions of this Court which we deem pertinent to the issue presented.

The petition should be denied.

Respectfully submitted,

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EDWARD FRIEDMAN,

ADRIAN BONNELLY,
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APPENDIX A

PENNSYLVANIA STATUTE

Act of March 31, 1860, P. L. 382:

Section 3. If any person arrested and imprisoned, charged with an indictable offense, shall break prison, or escape, or shall break prison, although no escape be actually made, such person shall be guilty of a misdemeanor, and on conviction be sentenced to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding two years, if the criminal charge on which such person stood committed was a crime or misdemeanor punishable, on conviction, by imprisonment by separate or solitary confinement at labor; or to imprisonment not exceeding one year, if such charge was a crime or misdemeanor punishable, on conviction, by simple imprisonment without labor; **if any prisoner imprisoned in any penitentiary or jail, upon a conviction for a criminal offense, other than murder in the first degree, or where the sentence is for imprisonment for life, shall break such penitentiary or jail, although no escape be actually made by him, such person shall be guilty of a misdemeanor, and upon conviction of said offense, shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped, or broke prison although no actual escape was made by him.** (Boldface ours.) (18 Purdon's Pennsylvania Statutes Annotated 251).

APPENDIX B

AMENDMENT 14 OF THE CONSTITUTION OF THE UNITED STATES.

Section 1—Citizenship—Due Process—Equal Protection * * * nor shall any State * * * deny to any person within its jurisdiction the equal protection of the law.